Bennett Subash Peter v Bon Ton Sdn Bhd (Bon Ton Resort Langkawi)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02(A)-1837–09 OF 2017
HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA
9 AUGUST 2018

Labour Law — Employment — Dismissal — Employee dismissed without prior warning during probation period without any charge that he committed misconduct or was guilty of poor work performance — Whether dismissal arbitrary, capricious and without just cause or excuse — Whether there was no bona fide reason for dismissal

The appellant was employed by the respondent as a manager for a probation period of three months. Without alleging any misconduct or poor work performance on the appellant's part, the respondent dismissed him during the probation period without prior warning. After a trial, the Industrial Court ('IC') found that the appellant's dismissal was arbitrary, capricious and without just cause or excuse. The High Court, on a judicial review application quashed the IC's award. In the instant appeal, the appellant argued that the High Court's decision was wrong because the IC had found as a fact after hearing witnesses and scrutinising the documentary evidence that there was no cogent or convincing evidence that justified his dismissal in the eyes of equity and good conscience and that the reasons the respondent canvassed at the trial in favour of the dismissal were unsubstantiated.

Held, allowing the appeal and setting aside the High Court's decision:

(1) The High Court had interfered with the decision of the Industrial Court on a matter related to findings of fact. It was not a fit and proper case for the High Court to have intervened when the Industrial Court had fairly and properly taken into consideration the evidence and all the material facts and the law before arriving at a conscionable decision which any reasonable tribunal similarly appraised of the facts would have come to. The decision of the Industrial Court in all aspects could not be said to be perverse (see paras 2 & 12).

(2) Whether it was a permanent employee or one on probation, industrial jurisprudence did not permit dismissal for arbitrary reasons. The reason for dismissal had to be bona fide. The bona fide test need not be objective. It depended on the facts and circumstances of the case (see para 9).

[Bahasa Malaysia summary

Perayu diambil bekerja oleh responden sebagai pengurus bagi tempoh percubaan tiga bulan. Tanpa mendakwa apa-apa salah laku atau prestasi kerja lemah oleh perayu, responden membuangnya semasa tempoh percubaan tanpa amaran terlebih dahulu. Selepas perbicaraan, Mahkamah Perusahaan ('MP') mendapati yang pembuangan kerja perayu adalah sewenang-wenangnya, tidak menentu dan tanpa alasan dan sebab adil. Mahkamah Tinggi, atas permohonan semakan kehakiman membatalkan award MP. Dalam rayuan ini, perayu berhujah bahawa keputusan Mahkamah Tinggi adalah salah kerana MP telah mendapati sebagai fakta selepas mendengar saksi-saksi dan meneliti keterangan dokumentar bahawa tidak terdapat keterangan jelas atau menyakinkan yang menjustifikasikan pembuangan kerjanya di mata ekuiti dan hati nurani yang baik dan bahawa alasan-alasan yang dicadangkan oleh responden semasa perbicaraan memihak pembuangan kerja adalah tidak berasas.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Mahkamah Tinggi telah campur tangan dengan keputusan Mahkamah Perusahaan atas perkara berkaitan kepada dapatan fakta. Ia bukan kes yang betul dan wajar untuk Mahkamah Tinggi campur tangan apabila Mahkamah Perusahaan telah secara adil dan betul membuat pertimbangan keterangan tersebut dan kesemua fakta material dan undang-undang sebelum mencapai kepada keputusan yang boleh diterima yang mana-mana tribunal yang munasabah yang menilai fakta yang sama akan mencapai kepadanya. Keputusan Mahkamah Perusahaan dalam semua aspeks tidak boleh dikatakan menentang (lihat perenggan 2 & 12).

(2) Sama ada ia adalah pekerja tetap atau satu dalam percubaan, jurisprudens perusahaan tidak membenarkan pembuangan kerja bagi alasan-alasan sewenang-wenangnya. Alasan untuk pembuangan kerja perlu bona fide. Ujian bona fide tidak perlu objektif. Ia bergantung atas fakta dan keadaan kes (lihat perenggan 9).]

Notes

For cases on legitimacy, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3483–3489.

Cases referred to

Abu Bakar bin Salleh & Ors v Langkasuka Resort Sdn Bhd & Anor [2018] 1 MLJ 248, CA (refd)

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007]5 MLJ 441, HC (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417; [1991] 1 CLJ Rep 159, SC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (refd)
Khaliah Abbas v Pesaka Capital Corporation Sdn Bhd [1997] 1 MLJ 376; [1997] 3 CLJ 827, CA (refd)
Md Nor bin Kassim v Malayan Banking Bhd [2017] 4 MLJ 71, CA (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)

Appeal from: Application for Judicial Review No 25–17–11 of 2016 (High Court, Alor Setar)

Bennett Subash Peter (representing himself).
Siti Rafidah bt Abdul Raof (Nurfarhana bt Fadzil with her) (Aswandi Hashim & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant appeals against the decision of the High Court which quashed the decision of the Industrial Court. The decision of the Industrial Court was in favour of the appellant.

[2] The facts of the case are quite straight forward. The law is also well settled. However, the learned High Court judge chose to interfere in the decision of the Industrial Court on a matter related to findings of fact. After hearing the appellant and respondent, we took the view that the appeal must be allowed and the decision of the High Court must be set aside in limine.

BRIEF FACTS

[3] The appellant was employed as a manager by the respondent at a salary of RM10,000 per month. The probation was for a period of three months. There was no misconduct on the part of the appellant in his work assignment though there was evidence to suggest that some of the staff were not happy with the way he managed them. The respondent terminated the employment during the probation period.

[4] The Industrial Court found that the appellant was dismissed without just cause and excuse and awarded a sum of RM90,000. The Industrial Court's finding was summarised by the learned High Court judge as follows:

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a. the first respondent was contractually terminated during the duration of his probation;

b. there was no effective prior oral or written warnings given to the first respondent that he was in real danger of being terminated prior to the actual event, and nor [sic] was any convincing reason whatsoever advanced for his dismissal;

B

c. there was no allegation of non-performance or poor performance;

d. the allegations of misconduct put forward at the trial in the Industrial Court were proved unsubstantiated;

C

e. there was not an iota of cogent or convincing evidence that could have rendered the applicant's action justifiable in the eyes of equity and good conscience;

f. the dismissal of the first respondent by the applicant was arbitrary and capricious and actuated by bad labour practice; and

D

g. the first respondent was dismissed without just cause and excuse.

[5] The memorandum of appeal of the appellant reads as follows:

E

1. That the learned judge erred in disregarding the detailed finding of facts made by the Industrial Court which had gone on to conclude that 'there was not an iota of cogent or convincing evidence that could have rendered the company's action justifiable in the eyes of equity and good conscience'.

F

2. That the learned judge erred when he failed to appreciate that the company had indeed put forward reasons for the Claimant's dismissal, which reasons were analysed by the Industrial Court and found to be unsubstantiated.

3. The learned judge erred in failing to appreciate or give consideration to the Industrial Court's observation of how material witnesses were not produced at trial so as to lend credence to the company's assertions.

G

4. The learned judge erred when he departed from the findings made by the Industrial Court that there was no just cause and excuse for the claimant's dismissal, but substituted the same with his own findings instead.

H

5. In the circumstances, the learned judge had erred in law and in fact in quashing the decision of the Industrial Court, which decision was made after hearing witnesses and scrutinizing the documentary evidence first hand.

I

JURISPRUDENCE RELATED TO JUDICIAL REVIEW AND TERMINATION OF EMPLOYMENT DURING THE PROBATION PERIOD

[6] It is now well established that an application for judicial review can succeed as of right if the inferior tribunal was in breach of constitutional safeguards or statutory safeguards or breach of the constitution or statute. However, when it relates to facts and evidence or cases which we often say as 'fact centric', the findings of fact of the inferior tribunal will not be a subject matter of appellate scrutiny unless the applicant seeking review can satisfy the court the decision suffers from: (a) illegality; (b) irrationality; and (c) procedural impropriety. In certain cases, the concept of proportionality. In *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007]5 MLJ 441, Hamid Sultan bin Abu Backer JC (as he then was) observed:

> [27] One of the leading cases which expounds the traditional doctrine of judicial review is the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, where Lord Diplock set out the three criteria for review and they are: (a) illegality; (b) irrationality; and (c) procedural impropriety and also set out the ground work for the fourth which was termed as proportionality. Lord Diplock expounded that: (i) Illegality means the decision maker must understand directly the law that regulates his decision making power and must give effect to it; (ii) Irrationality, his Lordship says, can be succinctly referred to as *Wednesbury* unreasonableness in reliance with the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided on could have arrived at it; (iii) Procedural impropriety covers not only a failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision, but also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice; (iv) Proportionality has been used as a head of judicial review in cases where the sanction or punishment meted out is altogether excessive and out of all proportion to the occasion (see for eg *R v Barnesley MBC, Ex parte Hook* [1976] 1 WLR 1052; *Wheeler v Leicester City Council* [1985] AC 1054). This requires public authorities to maintain a sense of proportion between the objectives pursued by them and the means they employ to achieve such objectives, so that their actions do not unnecessarily intrude on individual rights in the pursuit of such objectives but only so far as is necessary to preserve public interest.
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> [28] There are number of Malaysian cases, where the above principles were discussed, adopted and/or elaborated. Some of them are as follows: (i) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; (ii) *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; (iii) *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; (iv) *Rohana bte Ariffin v*

Universiti Sains Malaysia [1989] 1 MLJ 487; (v) *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* s[1996] 1 MLJ 481.

[7] The law on judicial review in Malaysia has developed in leaps and bounds. The court is said to have the powers to scrutinise the decision not only for process but also for substance to determine the reasonableness of the decision (see *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1; *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; *Abu Bakar bin Salleh & Ors v Langkasuka Resort Sdn Bhd & Anor* [2018] 1 MLJ 248).

[8] The concept of reasonableness flows through in all cases of judicial review. The test to succeed on reasonableness is high. For the appellate court to dwell on the issue of reasonableness, the applicant must demonstrate the decision of the inferior tribunal was so outrageous and it was also in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question would have arrived at that conclusion (see *Md Nor bin Kassim v Malayan Banking Bhd* [2017] 4 MLJ 71). *Thus, the test to intervene in the decision of a tribunal is extremely high when it is contrasted to the decision of a trial court in civil cases*. (Emphasis added.)

[9] Whether it is a permanent employee or one on probation, industrial jurisprudence does not permit arbitrary reasons for dismissal. The reasons for dismissal must be bona fide. The bona fide test need not be objective. It all depends on the facts and circumstances of the case. An honest reason as well as mutual agreement may be sufficient. A mutual agreement of termination based on lack of bona fide may not suffice to say there was indeed a just cause and excuse for dismissal. Industrial jurisprudence generally leans towards the employee as opposed to the employer. This biasness is one related to common sense as the employer and employee are not often seen to have equal bargaining powers. In *Khaliah Abbas v Pesaka Capital Corporation Sdn Bhd* [1997] 1 MLJ 376; [1997] 3 CLJ 827, the Court of Appeal held:

> [1] An employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of bona fide is thus essential in his dismissal. If the dismissal is found to be a colourable exercise of the power to dismiss or a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and set aside such dismissal.

[10] The well known author CP Mills in the book titled *Industrial Disputes Law in Malaysia* (2nd Ed) at p 111, observes:

The Industrial Court has held that employment of a person on probation does not give the employer a right to terminate the contract at his absolute discretion. Even at common law the employer's right to determine the contract during the probationary period depended on the employer being *reasonably* satisfied as to the unsuitability of the employee. That is to say, the employer's decision should be made bona fide, not arbitrarily or capriciously. That principle was applied in *Pakir Abdul Jalii v Syarikat Shell Refinery Co (F of M) Bhd* (Award No 20/74, 22 April 1974) but with a result that appears to fall short of the standard of equity and good conscience which the Act prescribes for the court's decisions.

In the *Pakir* case, a medical report obtained by the employer certified the workman unfit for employment, but other medical evidence was to the effect that the man's condition was normal. Although the court expressed 'some doubt' over the pre-employment medical report, it refused to hold that the employer had acted unjustly in terminating the employment: —

... the company accepted the verdict of its doctor as to the claimant's fitness and its decision was apparently made in good faith.

[11] Learned authors Nallini Pathmanathan, Siva Kanagasabai and Selvamalar Alagaratnam in the book titled *Law of Dismissal* at pp 204–205 say:

During the probation period, a probationer is being tested for his suitability for permanent employment. An employer has the prerogative to terminate the services of a probationer if the employer is satisfied that the probationer is not suitable for permanent employment. In the same vein, the probationer has a legitimate expectation that he will be confirmed if he proves to the satisfaction of the employer to be a fit and proper person for the appointment. Having invested his time and energy, and forgone the opportunity to establish himself elsewhere during the probationary period, it would be highly unjust if the employer can at his own pleasure and will terminate the probationer's employment without any genuine consideration being given to the latter's suitability for regular employment with the former.

In *Radiant Visions Sdn Bhd v Donald Wayne Dickman* [2003] 1 ILR 42, the Industrial Court, in coming to its decision on a probationer's dismissal on the ground of poor performance said:

> The question for the Industrial tribunal is: have the employers shown that they took reasonable steps to maintain appraisal of the probationer throughout the period of probation, giving guidance by advice or warning when such was likely to be useful or fair; and that an appropriate officer made an honest effort to determine whether the probationer came up to the required standard, having informed himself of the appraisals made by supervising officers and any other facts recorded about the probationer.
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> If this procedure is followed, it is only if the officer responsible for deciding upon selection of probationers then arrives at a decision which no reasonable assessment could dictate, that an industrial tribunal should hold the dismissal to be unfair.

6.13.5.1 Dismissal during probationary period

The general rule is that the dismissal must be premised on good faith and for good reasons. Dismissals before the expiry of the probationary period have been held by the Industrial Court to be unfair. The probation period was after all fixed and determined in advance by the company. This would accordingly entitle the probationer to have the full benefit of the probationary period for his work to be assessed adequately. The Industrial Court has gone so far as to state that the company should in certain circumstances extend the period of probation and render the appropriate assistance to enable the probationer to attain the required standards.

The High Court in the case of *Sulnayah Mohd Isa v Sekolah Kanak-kanak Pekak* [1999] 6 CLJ 234, made the following observation:

> ... an employee cannot be terminated by the employer during the currency of his probationary period. However, there is an exception to the rule, ie the employee can be terminated if he commits an act of misconduct for which reason even the services of a confirmed employee can be terminated.

This case makes it clear that an employee can be dismissed during the tenure of his probation on the grounds of misconduct. The court was of the view that premature termination for reasons other than misconduct would be deemed unjust.

[12] We have read the appeal records and the able submission of the appellant as well as the submissions of learned counsel for the respondent. We found that the respondent's submission had no merits. This is not a fit and proper case for the High Court to intervene when the Industrial Court has fairly and properly taken into consideration, the evidence, all the material facts as well as the law before arriving at the conscionable decision alluded to earlier in this judgment which any reasonable tribunal, similarly appraised of the facts will come to the same conclusion. The decision of the Industrial Court in all aspects cannot be said to be perverse as it was supported by evidence as well as the law (see *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; [1991] 1 CLJ Rep 159).

[13] For reasons stated above, we allowed the appeal with costs of RM10,000 subject to allocatur. The deposit to be refunded.

We hereby ordered so.

Appeal allowed; High Court's decision set aside.

Reported by Ashok Kumar